

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs at Knoxville September 22, 2009

STATE OF TENNESSEE v. JAMES HENRY NEWELL, JR.

Appeal from the Circuit Court for Montgomery County
No. 40501029 Michael R. Jones, Judge

No. M2008-02835-CCA-R3-CD - Filed November 20, 2009

A Montgomery County Circuit Court jury convicted the defendant, James Henry Newell, Jr., of aggravated criminal trespass, *see* T.C.A. § 39-14-406 (2003), attempted second degree murder, *see id.* § 39-13-210, -12-101, aggravated assault, *see id.* § 39-13-102, and domestic assault, *see id.* § 39-13-111. After merging the aggravated assault verdict into the attempted second degree murder verdict, the trial court imposed an effective sentence of 10 years' incarceration. In this appeal, the defendant contends that the trial court accepted his plea agreement with the State prior to the State's withdrawal of the offer and that, as a result, the State should not have been permitted to withdraw the offer, and the case should never have proceeded to trial. Discerning no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

Travis N. Meeks, Clarksville, Tennessee, for appellant, James Henry Newell, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Melissa Roberge, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Steven Garrett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

In November 2005, a Montgomery County grand jury returned an indictment charging the defendant, James Henry Newell, Jr., with the September 9, 2005 attempted first degree murder, aggravated assault, and domestic assault of his estranged wife, Sherry Newell, as well as the aggravated burglary of Ms. Newell's residence. On September 25, 2006, the defendant entered into a plea agreement with the State that provided for dismissal of the charges of aggravated assault,

domestic assault, and aggravated burglary in exchange for the defendant's pleading guilty to a reduced charge of attempted second degree murder. The agreement also provided for a sentence of 10 to 12 years with the manner of service of the sentence to be determined by the trial court. Following a sentencing hearing, the trial court imposed a sentence of 10 years' incarceration in the Department of Correction on November 13, 2006.

On March 15, 2007, the defendant filed a motion pursuant to Rule 32(f) of the Tennessee Rules of Criminal Procedure to withdraw his guilty plea, arguing that he pleaded guilty only as a result of coercion by his trial counsel. Fifteen days later, the trial court appointed counsel to represent the petitioner, and counsel filed an amended motion to withdraw the defendant's guilty plea. On November 5, 2007, the defendant filed a motion seeking dismissal of his appointed counsel on grounds that counsel was neglecting the defendant's case. The trial court granted the defendant's motion and appointed substitute counsel. Immediately following his appointment, substitute counsel filed a motion to be excused from appointment to the defendant's case because of his heavy workload. The trial court granted the motion and appointed the defendant's current counsel on December 12, 2007. Trial counsel amended the defendant's motion to withdraw his guilty plea on February 27, 2008, and the trial court granted the motion on March 20, 2008.

In September 2008, the defendant again entered into a plea agreement with the State that provided for a sentence of ten years' probation in exchange for the defendant's plea to the single reduced charge of attempted second degree murder. At the September 18, 2008 plea submission hearing, trial counsel explained that the parties had entered into an agreed "disposition of ten years . . . suspended sentence with six months of that ten years to be intensive probation supervision, and he's not getting any of his jail credit, his credit on this sentence, on that ten year sentence, so it's ten years from today." The trial court stated that it could not deny the defendant jail credit but did agree to place the defendant on probation for "[t]en years from today."

Following the State's recitation of facts, the trial court emphasized that it would not accept any plea agreement unless the defendant agreed to have "absolutely no contact" with the victim or their minor children. The defendant agreed that he would make no effort to contact the victim "or his children for at least the ten years that he's going to be on probation." The trial court then advised the defendant of those constitutional rights that would be waived by virtue of his pleading guilty, and the defendant agreed to waive those rights. The trial court then observed that it was "really hesitant about accepting this plea" and asked the defendant if he had any questions of his lawyer. The defendant then asked, through counsel, whether he would be entitled to jail credit should he violate his probation. The following exchange then occurred:

General Garrett:	I . . . simply say this: The nature of the question posed telegraphs what this man intends to do.
[Defense Counsel]:	I . . . disagree with that.
General Garrett:	I mean . . . I don't see how there can be any other interpretation.
[Defense Counsel]:	That wasn't even what he asked me.

The Court: Well, is the State withdrawing the offer?
General Garrett: Yes, sir.

Defense counsel then argued that the State was bound by the agreement and asked the court to accept it. The court observed that it was not prepared to accept the agreement at that point, but it agreed to research the issue over the weekend.

The parties arrived for trial on September 22, 2008, and following the selection of the jury, the defendant again argued that the court should enforce the agreement. The court concluded that it “had not accepted the plea, had not found [the defendant] guilty.” The trial court ruled that “the State could withdraw its offer at any time prior to the plea being accepted by the [c]ourt.”

At trial, the victim testified that the defendant came to her residence and physically assaulted her on her front porch. According to the victim, the defendant punched and kicked her several times before she was able to run away and telephone 9-1-1. As she ran away, she heard the defendant kick in the door to her home and then heard her daughter beg the defendant not to shoot the victim. When the victim turned around, the defendant pointed a handgun at her and pulled the trigger, but the gun misfired. The defendant attempted to remedy the malfunction and then pulled the trigger a second time, but the gun misfired again. Police arrived shortly thereafter, and the victim was taken to the hospital where she was treated for injuries she sustained in the attack.

From this evidence, the jury convicted the defendant of attempted second degree murder, criminal trespass, aggravated assault, and domestic assault. The trial court merged the verdict of aggravated assault into that of attempted second degree murder and, following a sentencing hearing, imposed an effective sentence of 10 years to be served in the Department of Correction. In this appeal, the defendant does not dispute the sufficiency of the convicting evidence, raises no challenges to the evidence presented at trial or the pretrial rulings of the trial court, and does not question the propriety of the sentence imposed by the trial court. Instead, the defendant presents only a single issue for our review: “Did the trial [c]ourt accept the plea agreement before the State withdrew their offer?”¹

Application of Law

The defendant asks this court to enforce the plea agreement entered into prior to trial and enter a judgment of conviction for the single offense of attempted second degree murder with a sentence of ten years’ probation. He argues that because the trial court had “tacitly” accepted the

¹ Had the defendant claimed instead that the State improperly or ineffectually withdrew from the plea agreement, we could discern the possibility that the appeal would be dismissible based upon the defendant’s failure to raise the issue in his motion for new trial. See Tenn. R. App. P. 3(e); *State v. Keel*, 882 S.W.2d 410, 416 (Tenn. Crim. App. 1994) (holding that on direct appeal from jury trial, any issue, other than sentencing, the meritorious consideration of which does not result in a dismissal of the charges, must be raised in a motion for new trial to preserve the issue for appellate review).

plea agreement, the court should not have permitted the State to withdraw the offer, and the trial should never have taken place.

It is well-settled that “[a]n offer to plea bargain is ‘revocable until accepted by the trial court.’” *State v. Street*, 768 S.W.2d 703, 711 (Tenn. Crim. App. 1988) (quoting *State v. Turner*, 713 S.W.2d 327, 329 (Tenn. Crim. App. 1986)). In consequence, a plea agreement remains unenforceable as to either party prior to acceptance by the trial court.

The record belies the defendant’s claim that the trial court had accepted the agreement. Although the trial court had satisfied the requirements of Rule 11 of the Tennessee Rules of Criminal Procedure and *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977), relative to the taking of guilty pleas, it had not yet asked the defendant whether he was guilty of the offense and had not made any finding of guilt. Indeed, the trial court noted its hesitance in accepting the agreement and asked the defendant on more than one occasion whether he wanted the court to do so. The court then offered the defendant a last chance to ask questions of his attorney before it accepted the plea. It was at that point that the State, troubled by the defendant’s question about the ramifications of a probation violation, withdrew the offer. The defendant cites no authority that a trial court “tacitly” accepts a guilty plea by performing its required duties under statute and case law, and we can find none.

Because the trial court did not accept the plea agreement prior to its withdrawal by the State, the defendant is not entitled to the relief he requests. Accordingly, the judgments of the trial court are affirmed.

JAMES CURWOOD WITT, JR., JUDGE